



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2014–0008]

[4500030113]

RIN 1018–BA32

Endangered and Threatened Wildlife and Plants; Special Rule for the Georgetown Salamander

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose a special rule under the authority of section 4(d) of the Endangered Species Act of 1973, as amended (Act), for the Georgetown salamander (*Eurycea naufragia*), a species that occurs in Texas. The special rule contains

measures that are necessary and advisable to provide for the conservation of the Georgetown salamander.

DATES: We will accept comments received or postmarked on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES: *Document availability:* You may obtain a copy of the City of Georgetown Ordinance 2013-59 described in this proposed rule from the Federal eRulemaking portal, <http://www.regulations.gov>, at Docket No. FWS-R2-ES-2014-0008.

Comment submission: You may submit comments on the proposed rule by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS-R2-ES-2014-0008, which is the docket number for this rulemaking. You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R2-ES-2014-0008; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.

We request that you send comments only by one of the methods described above. We

will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

FOR FURTHER INFORMATION CONTACT: Adam Zerrenner, Field Supervisor, U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 10711 Burnet Rd, Suite 200, Austin, TX 78758; by telephone 512–490–0057; or by facsimile 512–490–0974. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

(1) Whether the measures outlined in this proposed 4(d) special rule are necessary and advisable for the conservation and management of the Georgetown salamander;

(2) Additional provisions the Service may wish to consider for a 4(d) special rule in order to conserve, recover, and manage the Georgetown salamander.

We will consider all comments and information received during our preparation of a final 4(d) special rule. Accordingly, the final rule may differ from this proposal.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments **only** by the methods described in **ADDRESSES**.

If you submit information via *<http://www.regulations.gov>*, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *<http://www.regulations.gov>*.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *<http://www.regulations.gov>*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

On August 22, 2012, we published a proposed rule under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.), to list as endangered and designate critical habitat for the Georgetown salamander and three other salamander species (77 FR 50768). Elsewhere in today's **Federal Register**, we published a final determination to list the Georgetown salamander and the Salado salamander as threatened species. Please see the final listing determination for additional information concerning previous Federal actions for the Georgetown salamander.

Background

The Georgetown salamander is entirely aquatic and depends on water from the Edwards Aquifer in sufficient quantity and quality to meet its life-history requirements for survival, growth, and reproduction. Degradation of habitat, in the form of reduced water quality and quantity and disturbance of spring sites, is the main threat to this species. For more information on the Georgetown salamander and its habitat, please refer to the final listing determination published elsewhere in today's **Federal Register**, available online at <http://www.regulations.gov> (at Docket Number FWS-R2-ES-2012-0035) or from the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

The Act does not specify particular prohibitions, or exceptions to those prohibitions, for threatened species. Instead, under section 4(d) of the Act, the Secretary of the Interior has the discretion to issue such regulations as [s]he deems necessary and advisable to provide for the conservation of such species. The Secretary also has the discretion to prohibit by regulation with

respect to any threatened species, any act prohibited under section 9(a)(1) of the Act. Exercising this discretion, the Service developed general prohibitions (50 CFR 17.31) and exceptions to those prohibitions (50 CFR 17.32) under the Act that apply to most threatened species.

Alternately, for other threatened species, the Service may develop specific prohibitions and exceptions that are tailored to the specific conservation needs of the species. In such cases, some of the prohibitions and authorizations under 50 CFR 17.31 and 17.32 may be appropriate for the species and incorporated into a special rule under section 4(d) of the Act. However, these rules, known as 4(d) rules or special rules, will also include provisions that are tailored to the specific conservation needs of the threatened species and may be more or less restrictive than the general provisions at 50 CFR 17.31.

Provisions of the Proposed 4(d) Special Rule for the Georgetown Salamander

Under section 4(d) of the Act, the Secretary may publish a special rule that modifies the standard protections for threatened species with special measures tailored to the conservation of the species that are determined to be necessary and advisable. Under this proposed 4(d) special rule, the Service proposes that all of the prohibitions under 50 CFR 17.31 and 17.32 will apply to the Georgetown salamander, except as noted below. The proposed 4(d) special rule will not remove or alter in any way the consultation requirements under section 7 of the Act.

On December 20, 2013, the City Council of Georgetown, Texas, approved the Edwards Aquifer Recharge Zone Water Quality Ordinance (Ordinance No. 2013-59). The Service proposes that take incidental to activities that are conducted consistent with the conservation

measures contained in the ordinance will not be prohibited under the Act.

The purpose of this ordinance is to reduce the principal threats to the Georgetown salamander within the City of Georgetown and its extraterritorial jurisdiction through the protection of water quality near occupied sites known at the time the ordinance was approved, enhancement of water quality protection throughout the Edwards Aquifer recharge zone, and establishment of protective buffers around all springs and streams. Specifically, the primary conservation measures that will be implemented within the Edwards Aquifer recharge zone under Ordinance No. 2013-59 include:

- (1) A requirement for geologic assessments to identify all springs and streams on a development site;
- (2) The establishment of a no-disturbance zone that extends 262 feet (ft) (80 meters (m)) upstream and downstream from sites occupied by Georgetown salamanders;
- (3) The establishment of a minimal-disturbance zone that extends 984 ft (300 m) around all occupied sites within which development is limited to Residential Estate and Residential Low-Density District as defined in the City of Georgetown's Unified Development Code;
- (4) The establishment of a spring buffer that extends 164 ft (50 m) around unoccupied springs;
- (5) The establishment of stream buffers for streams that drain more than 64 acres (ac) (26 hectares (ha)); and
- (6) A requirement that permanent structural water quality controls (i.e., best management practices (BMPs)) remove 85 percent of total suspended solids for the entire project.

Additionally, an Adaptive Management Working Group has been established that is specifically charged with reviewing salamander monitoring data and new research over time and recommending improvements to the ordinance that may be necessary to ensure that it achieves its stated purposes. This Adaptive Management Working Group, which includes representatives of the Service and Texas Parks and Wildlife Department, will also review and make recommendations on the approval of any variances to the Ordinance as well as the Georgetown salamander's status.

This provision of the proposed 4(d) special rule will promote conservation of the Georgetown salamander by encouraging activities to proceed in ways that meet the needs of the City of Georgetown and its constituents while simultaneously conserving suitable habitat for the Georgetown salamander. The ordinance is expected to reduce the threat of habitat degradation by reducing impacts to water quality and quantity and limiting disturbance of spring sites, and thereby will contribute to the conservation of the Georgetown salamander.

Nothing in this proposed 4(d) special rule changes in any way the recovery planning provisions of section 4(f) and consultation requirements under section 7 of the Act or the ability of the Service to enter into partnerships for the management and protection of the Georgetown salamander.

Proposed Determination

Section 4(d) of the Act states that “the Secretary shall issue such regulations as [s]he

deems necessary and advisable to provide for the conservation” of species listed as a threatened species. Conservation is defined in the Act to mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.” Additionally, section 4(d) states that the Secretary “may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1).”

The courts have recognized the extent of the Secretary’s discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, the Secretary may find that it is necessary and advisable not to include a taking prohibition, or to include a limited taking prohibition. See *Alsea Valley Alliance v. Lautenbacher*, 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council v. National Marine Fisheries Service*, and 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002). In addition, as affirmed in *State of Louisiana v. Verity*, 853 F.2d 322 (5th Cir. 1988), the rule need not address all the threats to the species. As noted by Congress when the Act was initially enacted, “once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. [S]he may, for example, permit taking, but not importation of such species,” or [s]he may choose to forbid both taking and importation but allow the transportation of such species, as long as the measures will “serve to conserve, protect, or restore the species concerned in accordance with the purposes of the Act” (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Section 9 prohibitions make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, shoot, wound, kill, trap, capture, or collect; or attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any wildlife species listed as an endangered species, without written authorization. It also is illegal under section 9(a)(1) of the Act to possess, sell, deliver, carry, transport, or ship any such wildlife that is taken illegally. Prohibited actions consistent with section 9 of the Act are outlined for threatened species in 50 CFR 17.31(a) and (b). This proposed 4(d) special rule proposes that all prohibitions in 50 CFR 17.31(a) and (b) will apply to the Georgetown salamander, except activities that are conducted consistent with the conservation measures contained in the City of Georgetown Ordinance 2013-59. Based on the rationale explained above, the provisions included in this proposed 4(d) special rule are expected to contribute to the conservation of the Georgetown salamander and are therefore necessary and advisable to provide for the conservation of the Georgetown salamander.

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. We will send peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the reopening of the public comment period, on our use and interpretation of the science used in developing our proposed 4(d) special rule.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996)), whenever an agency

must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for “significant impact” and a threshold for a “substantial number of small entities.” See 5 U.S.C. 605(b). Based on the information that is available to us at this time, we certify that this regulation will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

Elsewhere in today’s **Federal Register**, we published the final determination to list the Georgetown salamander as a threatened species. As of the effective date of that final determination, the Georgetown salamander will be covered by the full protections of the Endangered Species Act, including the full section 9 prohibitions that make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, shoot, wound, kill, trap, capture, or collect; or attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any wildlife species listed as an endangered species, without written authorization. It also is illegal under section 9(a)(1) of the Act to possess, sell, deliver, carry, transport, or ship any such wildlife that is taken illegally. Prohibited actions consistent with

section 9 of the Act are outlined for threatened species in 50 CFR 17.31(a) and (b). This proposed 4(d) special rule proposes that all prohibitions in 50 CFR 17.31(a) and (b) will apply to the Georgetown salamander, except activities that are conducted consistent with the conservation measures contained in the City of Georgetown Ordinance 2013-59, which would result in a less restrictive regulation under the Endangered Species Act, as it pertains to the Georgetown salamander, than would otherwise exist. For the above reasons, we certify that if promulgated, the proposed rule would not have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we make the following findings:

(a) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)–(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or [T]ribal governments” with two exceptions. It excludes “a condition of Federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and [T]ribal

governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or Tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

(b) This proposed 4(d) special rule proposes that all prohibitions in 50 CFR 17.31(a) and (b) will apply to the Georgetown salamander, except activities that are conducted consistent with the conservation measures contained in the City of Georgetown Ordinance 2013-59, which would result in a less restrictive regulation under the Endangered Species Act, as it pertains to the Georgetown salamander, than would otherwise exist. As a result, we do not believe that this rule would significantly or uniquely affect small governments. Therefore, a Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630, this proposed rule would not have significant takings implications. We have determined that the rule has no potential takings of private

property implications as defined by this Executive Order because this proposed special rule would result in a less-restrictive regulation under the Endangered Species Act than would otherwise exist. A takings implication assessment is not required.

Federalism

In accordance with Executive Order 13132, this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. This proposed rule would not have substantial direct effects on the State, on the relationship between the Federal Government and the State, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Energy Supply, Distribution or Use (Executive Order 13211)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking actions that significantly affect energy supply, distribution, and use. For reasons discussed within this proposed rule, we believe that the rule would not have any effect on energy

supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must: (a) be logically organized; (b) use the active voice to address readers directly; (c) use clear language rather than jargon; (d) be divided into short sections and sentences; and (e) use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the proposed rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.)

This proposed rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. This proposed rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor,

and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We intend to undertake an environmental assessment of this action under the authority of the National Environmental Policy Act of 1969 (NEPA). We will notify the public of the availability of the draft environmental assessment for this proposal when it is finished.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We determined that there are no known tribal lands within the range of the Georgetown salamander.

Authors

The primary authors of this proposed rule are the staff members of the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245; unless otherwise noted.

2. Amend § 17.43 by adding paragraph (e) to read as follows:

§ 17.43 Special rules—amphibians.

* * * * *

(e) Georgetown salamander (*Eurycea naufragia*).

(1) *Prohibitions.* Except as noted in paragraph (e)(2) of this section, all prohibitions and provisions of §§ 17.31 and 17.32 apply to the Georgetown salamander.

(2) *Exemptions from prohibitions.* Incidental take of the Georgetown salamander will not be considered a violation of section 9 of the Act if the take occurs on privately owned, State, or county land from activities that are conducted consistent with the conservation measures contained in the City of Georgetown, Texas, Ordinance 2013-59.

Dated: February 14, 2014

Signed: Daniel M. Ashe

Director, U.S. Fish and Wildlife Service

Billing Code 4310–55

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